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No. 89-1167

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT L. BRUTSCHE, PETITIONER

*v.*

LINDA CLEVELAND-PERDUE, ETC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

This is a *Bivens* action against a supervisory official in the federal Bureau of Prisons seeking damages for the death of respondent's decedent. The questions presented are:

1. Whether, in a case in which there is no controlling precedent from this Court or in the relevant circuit, a consensus in the case law decided by other circuits may constitute "clearly established" law for purposes of determining whether a public official is entitled to qualified immunity.

2. Whether it was "clearly established" in 1975 that the challenged actions of petitioner with respect to the provision of medical care at the Terre Haute prison were unconstitutional.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States in this case.[1]

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[1] All of the defendants in this case, including petitioner, were represented by Department of Justice counsel from the outset of the case through the determination of the threshold question of the availability of a *Bivens* remedy in *Carlson* v. *Green*, 446 U.S. 14 (1980). On this Court's remand for further proceedings in *Carlson* v. *Green*, *supra*, it was decided that the Department should no longer represent all of the defendants because of potential conflicts among the defendants. Accordingly, the Department approved a request to retain separate counsel for the defendants. Norman Carlson

## STATEMENT

1. Petitioner was the Medical Director of the federal Bureau of Prisons (BOP) from 1969 through 1975, the year that the events giving rise to this lawsuit occurred. His duties included planning, directing, and controlling the comprehensive health care program of the BOP, which encompassed some 20,000 inmates at more than 30 institutions, including the penitentiary at Terre Haute, Indiana. Petitioner did not have responsibility for the daily administration of medical care to inmates; that duty was assigned to the chief physician and hospital administrator at each prison, both of whom worked directly under the warden. The chief physician was responsible for professional medical care, while the hospital administrator was responsible for the management of hospital administrative functions. Pet. App. B2.

2. During 1975, four deaths occurred among inmates receiving medical care at the Terre Haute penitentiary. Petitioner conducted an investigation of the circumstances of each death, made recommendations regarding certain corrective action, and hired a new full-time staff physician, Dr. Benjamin DeGracias, for the facility. The fourth inmate death was that of respondent's decedent, Joseph Jones, Jr., on August 14, 1975. His death led to this lawsuit. Pet. App. B2-B11.[2]

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and Dr. Robert Brutsche are represented by one set of private counsel. Dr. Benjamin DeGracias is represented by another set of private counsel. The Department is paying for the private representation of petitioner and the other defendants.

[2] The circumstances concerning the three prior inmate deaths are detailed in the district court's opinion. Pet. App. B2-B8. At the time of the first inmate death, the prison

Jones had a long history of asthma for which he had received medication and treatment within the federal prison system since his incarceration in 1973. On his request, he had been transferred to Terre Haute in July 1973 to be closer to his family. He had sought care for his asthma at the prison hospital on several occasions, and continued to take his medications. Jones had a severe asthma attack on July 28, 1975. He was admitted to the prison hospital, where he was treated for the next 36 hours, then transferred to the local hospital where he stayed another seven days and his condition improved. On the recommendation of a local hospital physician that Jones be sent to a more favorable climate, the prison hospital administrator prepared a transfer recommendation for a prison facility in Texas, with the apparent assumption that the transfer would occur directly from the local hospital. Jones was returned to the Terre Haute facility, however, before the transfer took place. Pet. App. B8-B9.

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hospital used one full-time physician (Dr. Silverman) and five local physicians on a rotating basis. (Ordinarily, there would be two full-time physicians on staff at the prison, but the expiration of the military draft, low salaries, and the unappealing nature of the work made it difficult to find a second full-time physician. Instead, the five local physicians were used to fill the second physician "slot.") As a result of his investigation of the first inmate's death, petitioner recommended that Dr. Silverman be dismissed. The warden agreed, and permitted Dr. Silverman to resign. The rotating physicians stepped up their responsibilities until another full-time physician could be hired; two more inmates died during this period. In August 1975, petitioner hired Dr. DeGracias to replace Dr. Silverman. Dr. DeGracias was hired from the Civil Service Register, without a personal interview, but after petitioner had checked all of his references. Dr. DeGracias reported for work on August 3, 1975. Pet. App. B2-B8.

Jones was discharged from the prison hospital and released to "full duty." Four days later, he experienced wheezing in both lungs and was seen as an outpatient in the prison hospital by Dr. DeGracias. On August 14, he was admitted to the prison hospital for a severe asthma attack. Dr. DeGracias prescribed treatment over the telephone several times in the course of the day and evening, but did not see Jones personally, and he rejected a recommendation to send Jones to the local hospital. When Jones became restless at about 10 p.m., Dr. DeGracias prescribed Thorazine, a tranquilizer, by telephone. The drug was administered, and at about 11 p.m. Jones went into respiratory arrest. Dr. DeGracias came to the prison hospital and ordered Jones taken to the local hospital, where he was pronounced dead at 11:40 p.m. Pet. App. B9-B10.

Petitioner visited Terre Haute to investigate Jones's death. He rechecked Dr. DeGracias's references and discussed the situation with the director of the Bureau of Prisons. He subsequently issued further recommendations to the warden regarding the maintenance of full inpatient medical records, more liberal use of outside facilities, better staff communication, review of all "problem" cases, and a policy of physician availability during off-duty hours. Pet. App. B10-B11.

3. The representative/administratrix of Jones's estate brought this *Bivens*[3] action for damages against, among others, Norman Carlson, the director of the Bureau of Prisons, Dr. DeGracias, and petitioner. (Respondent is the successor representative/administratrix). The complaint alleged that Jones's

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[3] See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

death was caused by the defendants' deliberate indifference to his medical needs, in violation of the Eighth Amendment. See *Estelle* v. *Gamble*, 429 U.S. 97 (1976). After this Court held in *Carlson* v. *Green*, *supra*, that a *Bivens* remedy is available for such a claim and survived Jones's death, the defendants moved for summary judgment on qualified immunity grounds. Pet. App. C2-C3.

The district court initially denied the motion as to all three defendants, on the ground that the "deliberate indifference" standard for stating a violation of the Eighth Amendment was "clearly established" within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Pet. App. D1-D12. The court of appeals vacated the district court's judgment and remanded with directions to apply the *Harlow* standard specifically to the undisputed facts in the record, as required by *Anderson* v. *Creighton*, 483 U.S. 635 (1987). Pet. App. C1-C13. On remand, the district court granted the motion as to defendant Carlson, but denied the motion as to petitioner and Dr. DeGracias. The court ruled that the law regarding the medical needs of prisoners was "clearly established" by *Thomas* v. *Pate*, 493 F.2d 151, 157-159 (7th Cir.), vacated on other grounds, 419 U.S. 813, cert. denied, 419 U.S. 879 (1974) (cross-petition), and that only defendant Carlson was entitled to qualified immunity on the basis of the undisputed facts in the record. Pet. App. B1-B23.

4. Petitioner appealed,[4] and the court of appeals affirmed. Pet. App. A1-A9. The court noted that *Thomas* v. *Pate*, *supra*, did not involve allegations of "systemic deficiencies" in prison medical care and thus did not clearly establish the law for a super-

[4] Dr. DeGracias did not take an interlocutory appeal.

visory official in petitioner's position. Pet. App. A6-A7. The court also determined that at the time of the events in suit, there was no "controlling precedent" on this point in the decisions of this Court or of the Seventh Circuit. With respect to its own precedents, the court of appeals noted that there was "no decision by this court recognizing that a failure to remedy systemic deficiencies in health care services at a prison violated the eighth amendment prior to 1983." *Id.* at A7. Under these circumstances, the court held that the following standard should be applied (*ibid.*):

> In the absence of a controlling precedent we look to all relevant case law in an effort to determine whether at the time of the alleged acts a sufficient consensus had been reached indicating that the official's conduct was unlawful. To state the proposition in another way, we seek to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time. This approach makes eminent sense for it precludes an official from escaping liability for unlawful conduct due to the fortuity that a court in a particular jurisdiction had not yet had the opportunity to address the issue.

The court then applied that approach in this case. "After reviewing the relevant case law," the court found that by 1975 there was "a clear consensus" in the decisions of other courts of appeals "indicating that a prison official's failure to remedy systemic deficiencies in medical services akin to those alleged in the present case constituted deliberate indifference to an inmate's medical needs." Pet. App. A7. In so ruling, the court relied on *Newman* v. *Alabama*, 503

F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); *Finney* v. *Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974); and *Bishop* v. *Stoneman*, 508 F.2d 1224 (2d Cir. 1974). Pet. App. A7-A9. After analyzing those cases, the court concluded that "a failure to correct systemic deficiencies in the delivery of health care services at a prison violated clearly established law in 1975," and that "given the types of systemic problems addressed in *Newman* and *Finney* * * * a reasonable official in [petitioner's] position would have known that a failure to remedy the alleged inadequacies at Terre Haute constituted deliberate indifference to the medical needs of the inmate population." Pet. App. A9.

## DISCUSSION

The principal disagreement between the parties is whether the court below adopted a new standard for measuring a public official's entitlement to qualified immunity. Petitioner claims that the court of appeals adopted a standard asking whether there was a "clear trend" in the law, instead of determining whether "clearly established" law showed that a public official acted unconstitutionally. Respondent maintains that the court simply determined the state of the law in 1975 by looking to decisions of other circuits and did not adopt a new qualified immunity standard. We believe that respondent has the better of this argument and that the Seventh Circuit did not, as petitioner claims, adopt a new qualified immunity standard. By contrast, we agree with petitioner that the court of appeals erred in equating the facts of this case to the facts of those cases. Petitioner's conduct in this case did not rise to the level of "deliberate indifference" required to establish a violation of the Eighth Amendment, and thus we

believe that petitioner should have been granted qualified immunity. Nonetheless, we conclude that the issue on which we believe the court of appeals erred does not warrant this Court's review on the present petition. Moreover, the courts below have not considered all of the issues that this case presents. Accordingly, we recommend that the petition be denied.

1. A public official is entitled to qualified immunity from damages liability if his actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The Court in *Harlow* did not explain precisely how the "state of the law" at a particular time should be evaluated in order to make this determination. See *id.* at 818 n.32. See also *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978).[5] But the Court has adopted several principles to guide that inquiry.

First, the qualified immunity inquiry is retrospective in nature. The task is to determine "not only the currently applicable law, but whether that law was clearly established at the time an action occurred," *Harlow*, 457 U.S. at 818, because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Put another way, an "official cannot be expected to predict the future course of constitutional law." *Navarette*, 434 U.S.

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[5] *Procunier* involved a suit under 42 U.S.C. 1983, rather than a *Bivens* action; this Court has explained that the scope of immunity available to federal officers in a *Bivens* action is generally the same as that available to state officials sued under Section 1983. See *Harlow* v. *Fitzgerald*, 457 U.S. at 818 n.30; *Butz* v. *Economou*, 438 U.S. 478, 504 (1978).

at 562.[6] Second, the pre-existing law must be established with a considerable degree of factual specificity so that an official can know whether his own conduct is unlawful. *Anderson*, 483 U.S. at 639-641. The right alleged to have been violated must have been "clearly established" in a "particularized" sense, *id.* at 640; a court's inquiry into the state of the law must be "fact-specific," *id.* at 641; and the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," *id.* at 640. It is unnecessary for the "very action in question" to have been already held unlawful, but in light of pre-existing law its illegality "must be apparent." *Ibid.*

What remains unclear are the *sources* of law to which a court may look in making its inquiry. The Court held in *Navarette*, 434 U.S. at 563-565, that the "law" concerning the censorship of prisoners' mail was not "clearly established" by any decision of "this Court, of the Courts of Appeals, or of the local District Court." Similarly, in *Mitchell* v. *Forsyth*, 472 U.S. 511, 530-535 (1985), the Court ruled that the law regarding the Executive's authority to conduct warrantless domestic security wiretaps was not "clearly established" in 1970 because six successive administrations had considered that practice consti-

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[6] Accord *Anderson*, 483 U.S. at 640 ("in the light of pre-existing law the unlawfulness [of an official's conduct] must be apparent"); *Davis* v. *Scherer*, 468 U.S. 183, 191 (1984); *Harlow*, 457 U.S. at 818 (an official cannot "reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful"); *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975); *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967). See also *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985) (an official is immune unless "the law clearly proscribed the actions" he took).

tutional; only three years beforehand this Court had expressly left that possibility open in *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967); and two district courts had agreed with the Executive's position. But this Court has offered little guidance beyond those decisions, and has never determined whether the law must be "clearly established" by decisions of courts (federal or state, appellate or trial) in the same jurisdiction where the allegedly unlawful events took place.

Here, the Seventh Circuit found no "controlling precedent" in its own decisions or in the decisions of this Court. Pet. App. A7. It therefore turned to the decisions of other circuits involving claims that systemic deficiencies in a prison's health care facilities rendered the medical treatment constitutionally inadequate. *Ibid.* Petitioner does not challenge the court of appeals' decision to consider the case law in other circuits to determine whether the "law" was clearly established in 1975. Pet. Reply Br. 6. Instead, petitioner argues that the court of appeals, in so doing, erred by reformulating the *Harlow* "clearly established" standard as a "clear trend" standard, which requires an official to hazard a guess about the future development of constitutional law. *Id.* at 6-7.

We do not believe that, fairly read, the court below established an improper standard for determining whether, at the time of the acts in question, the governing law was clearly established. The court said, in substance, that even in the absence of a controlling precedent in this Court or the relevant court of appeals, a right can be clearly established if there was in other courts a sufficiently clear consensus on the issue that the announcement of a controlling precedent was simply a question of time. And the court then proceeded to find such a "clear consensus" in the

decisions of three other federal courts of appeals—decisions that, in its view, involved "systemic deficiencies in medical services akin to those alleged in the present case." Pet. App. A7.

We agree that a controlling precedent in this Court or in the relevant court of appeals is not invariably required in order for a constitutional right to be clearly established. To be sure, difficult questions may be presented in particular cases—for example, whether an issue has been sufficiently litigated, and whether a particular individual may properly be held to have lost a claim of qualified immunity on the basis of decisions in jurisdictions other than his own. But in this case, the officer in question—the Medical Director of the federal Bureau of Prisons—was a federal official with national responsibilities, and the courts whose decisions were regarded as founding the consensus were three federal courts of appeals.[7] Moreover, no contrary decisions of other courts were noted. In these circumstances, we do not think the use of a "consensus" standard by the court below was improper.

Furthermore, the decision below does not conflict with the decision of any other court of appeals. Petitioner (Pet. 11-12) asserts a conflict with the decision of the D.C. Circuit in *Zweibon* v. *Mitchell*, 720 F.2d 162 (1983), cert. denied, 469 U.S. 880 (1984), but no such conflict in fact exists. *Zweibon* involved a *Bivens* action based on the authorization without a warrant of certain "national security" wiretaps. At an earlier stage of the case, the court of appeals had held that the authorization of such wiretaps was unlawful and that the decision should be given retroactive effect

[7] The court of appeals' approach might well be inappropriate for an official without such national responsibilities.

with respect to the plaintiffs' constitutional claims. See *Zweibon* v. *Mitchell*, 606 F.2d 1172 (1979), cert. denied, 453 U.S. 912 (1981). But, at that stage, the court had left open the issue of qualified immunity, 606 F.2d at 1181, and in its 1983 decision, the court determined that the defendant's claim of qualified immunity should be upheld. The court noted that when the wiretaps were initially installed, "the only federal courts that had addressed the issue * * * had concluded that warrants were unnecessary" (720 F.2d at 169), and that even when the wiretaps were renewed, lower court decisions were sharply divided. *Id.* at 171-172. The court emphasized the difference between, on the one hand, the question whether a constitutional holding should be given retroactive effect because that holding was "clearly foreshadowed" and, on the other hand, the question whether a constitutional right was "clearly established" at a particular time for purposes of qualified immunity. *Id.* at 172-173.

Thus, the court in *Zweibon* said nothing that would conflict with the approach of the court below. Indeed, no argument could have been made in *Zweibon* that there was anything approaching a consensus supporting recognition of a constitutional right during the period of the conduct at issue. And the D.C. Circuit went out of its way to emphasize that its determination with regard to retroactivity was based on a wholly different standard from the standard applicable to qualified immunity.[8]

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[8] Petitioner apparently views the court of appeals' decision as establishing a standard equivalent to the "clearly foreshadowed" test rejected in the *Zweibon* qualified immunity decision. Pet. 11-12. In view of the court of appeals' explicit reliance in this case on its determination that "a clear consensus had been reached" (Pet. App. A7), we do not share petitioner's reading of the court of appeals' decision.

2. Although we do not disagree with the standard articulated by the court below in the context of this case, we agree with petitioner that the application of that standard in light of the available precedents was incorrect. As noted above, the court concluded that there was "a clear consensus" generally "indicating that a prison official's failure to remedy systemic deficiencies in medical services akin to those alleged in the present case constituted deliberate indifference to an inmate's medical needs." Pet. App. A7. That "consensus" was purportedly evidenced by the decisions in *Newman* v. *Alabama*, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); *Finney* v. *Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974); and *Bishop* v. *Stoneman*, 508 F.2d 1224 (2d Cir. 1974). But an examination of the facts of those cases demonstrates that the court of appeals' reliance on them to defeat petitioner's claim of qualified immunity was unwarranted.

First, the conditions found unconstitutional in those cases were substantially more pervasive and more severe than those relied on here. Thus, the decisions provided little indication of what constitutes "deliberate indifference" in less extreme circumstances. Second, while the courts in *Newman*, *Bishop*, and *Finney* had begun to recognize that prison administrative officials generally have a duty to provide a constitutionally adequate system for the delivery of inmate medical care, they did not focus on the particular level of responsibility of any individual prison official. Specifically, none of the cases indicated, much less "clearly established," the minimum constitutional expectations for an official in petitioner's position, who was not responsible for the daily administration of inmate medical care and who had no direct authority over those (the warden, prison

physician, and prison hospital administrator) who were.

The *Newman* case was a class action for declaratory and injunctive relief for inadequate prison health care brought against the State of Alabama and its prison system as a whole. The court made no attempt to fix individual responsibility among the various state officials or levels of prison administration involved, which included the state attorney general, the warden of the prison system's central hospital facility, the Alabama Board of Corrections, its commissioner, its chairman, and four members. 503 F.2d at 1322 & n.2. Indeed, the court noted with sympathy that the defendant prison officials were collectively "shackled by anachronistic equipment, inadequate staffing, and parsimonious funding," which rendered "Sisyphean" their task of providing constitutionally adequate care. *Id.* at 1333.

In addition, the conditions alleged here are not comparable in scope or degree to those found to be unconstitutional in *Newman*. *Newman* involved deficiencies both in the prison system's central hospital facility and in the health units of some 19 other institutions. The conditions at the facilities included use of part-time or no professional medical staff, unsanitary cleaning procedures and equipment, chronic shortages of basic medical supplies (forcing one institution to use rags and towels in lieu of gauze for bandages), outdated anesthetic procedures and equipment, lack of ambulances, lack of fire emergency procedures, lack of treatment for the mentally ill, and specific instances of maltreatment including a wound discovered to be infested with maggots for which the dressing remained unchanged for another 20 days, and a fatal amputation made necessary because an incontinent geriatric inmate was forced to sit on a wooden bench all day to

keep his bed clean. The central hospital prison and diagnostic center itself was found not only to be understaffed in many respects but also, like the other prisons, to be suffering from unsanitary conditions, obsolete equipment and drugs, delays, and limitations on treatment. 503 F.2d at 1322-1324.

*Bishop* was a suit under 42 U.S.C. 1983 for injunctive relief against the Vermont commissioner of corrections and the warden of the state prison, alleging constitutionally inadequate prison medical care. The allegation was based primarily on specific instances of lengthy delays to see the prison's single, part-time physician (six months for a back problem; a three-week wait while an inmate lost 30 pounds due to later-diagnosed cirrhosis of the liver; a three-day wait while an inmate with a fever was vomiting blood; a one-week wait for an inmate who could not eat and was vomiting; and a one-week wait to see the doctor for severe stomach pains, which upon surgery at a local hospital turned out to be caused by a gangrenous appendix). 508 F.2d at 1225. The Second Circuit held these allegations sufficient to state a claim of deliberate indifference to prisoner medical needs, and remanded the case for further proceedings on the prayer for an injunction. The court had no occasion to fix responsibility between the two defendant officials—the commissioner of corrections and the prison warden—who in any case did not occupy positions of authority comparable to petitioner's. And the claims showed a pattern of more severe lack of access to professional medical attention than is supported by the allegations here.

*Finney* was also a suit under 42 U.S.C. 1983 for declaratory and injunctive relief against various Arkansas state prison officials and others, seeking correction of a broad range of alleged unconstitutional

prison conditions, among them inadequate medical care. One of the two prisons in question employed *no* physician or psychiatrist; neither prison had dentists or registered professional nursing supervision; inmates with contagious diseases were not isolated; there was "not even basic emergency service"; and the medical facilities did not meet basic hospital licensure standards. 505 F.2d at 202-204. The court also emphasized a state study of the prison's health care service, which had found a "[l]ack of sufficient [non-inmate] personnel," "completely inadequate" equipment, and the need for "more professional assistance," "[b]etter transportation," and maintenance of more complete medical records, *id.* at 203, but the court did not delineate the conditions underlying those conclusions.

Thus, even had these decisions been "controlling precedents" in the Seventh Circuit, they did not reasonably put petitioner, in the particular circumstances of this case, on notice of a "right" whose "contours * * * [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson*, 483 U.S. at 640. Nor, "in the light of pre-existing law," would the unlawfulness of petitioner's actions in responding to the conditions alleged here have been "apparent." *Ibid.*[9]

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[9] For the same reasons, *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir. 1974), cited by respondent, also did not "clearly establish" the relevant law. *Gates* was an injunctive action against the superintendent of the Mississippi state penitentiary, the state penitentiary board and the state governor alleging a broad range of unconstitutional conditions at the state penitentiary, including inadequate medical care. The court of appeals affirmed (and the defendants admitted) that the district court's findings of a lack of "prompt or efficient" medical treatment, "rampant" "[u]nsanitary conditions," failure to

3. Although we disagree with the result reached by the court below, we believe that this Court's review is not warranted at this time.

With respect to petitioner's first question, the standard articulated by the court of appeals for determining whether a right was clearly established is not, in this context, an incorrect one, nor does it conflict with the approach taken in any other circuit. The defendant is a federal official with nationwide responsibilities, and the "consensus" found to exist by the court below was based on consideration of a number of decisions of federal appellate courts.

With respect to petitioner's second question, we agree with petitioner that the court of appeals erred in its conclusion that the facts underlying the decisions in three other Circuits were "akin to those alleged in the present case." Pet. App. A7. However, we believe that the detailed factual comparison of this case with those other decisions, as required by *Anderson* v. *Creighton*, is not an issue that calls for this Court's further review on this petition. More-

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isolate contagious inmates, complications caused by "lack of medical treatment," and a practice of discouraging inmates from seeking care by "punishing those who on examination appear to be healthy," 501 F.2d at 1300, amounted to unconstitutional treatment. *Id.* at 1303-1304. But while the court upheld "for the time being" the specific staffing and administrative changes prescribed by the district court (including an order to employ at least three full-time physicians and six full-time licensed or registered nurses, to comply with national standards for prisoner medical care, and to bring plant and equipment into compliance with state licensing requirements), it did not pass on the constitutional necessity for such changes, stating that "any decision dissecting what precise degree of improvements in [the areas of medical care and physical facilities] is necessary to meet constitutionally minimal standards is premature at this stage." *Id.* at 1304.

over, certain aspects of the case remain to be fully explored and may shed further light on the issues. As noted above, even if the conditions of treatment in this case amounted to a deprivation of a constitutional right, serious questions remain of the extent to which an individual official may be held accountable in damages for those conditions. To the extent that the conditions are the result of a scarcity of resources or of competent personnel, singling out an individual as a scapegoat for those systemic problems is wholly inappropriate.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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